Supreme Court, U. S.
FILED
OCT 15 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1267

BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY,
and POULTRY PROCESSING, INC.

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

ALAN J. LEVENSON, Esq.
Attorney for Petitioners
187 Middle Street
Portland, Maine 04111

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement	4
Argument	5
The Company's Six Feed Drivers Are "Agricultural Laborers" and Therefore Exempt Under Section 2(3) of the National Labor Relations Act.	5
I. Introduction and Summary	5
II. Bayside as a Farmer	7
A. Bayside as less than a farmer—the growout contract	7
B. Bayside as more than a farmer—the processing plant	10
C. Bayside as a poultry raiser—the employing entity	14
III. The Feed Drivers as Being Incidental to and in Conjunction With Farming	19
Conclusion	21

Table of Citations

Cases

Abbott Farms, Inc. v. *National Labor Relations Board,* 487 F.2d 904 (5th Cir. 1973)	12, 20
Birmingham v. *Rucker's Breeding Farm,* 152 F.2d 837 (8th Cir. 1945)	20
Bowie v. *Gonzalez,* 177 F.2d 11 (1st Cir. 1941)	11
Colchester Egg Farms, Inc., 214 NLRB No. 64 (1974)	19
DiGiorgio Fruit Corp., 80 NLRB 853 (1948)	13
Elm Spring Farm v. *United States,* 127 F.2d 920 (1st Cir. 1942)	8

Page

Etchechoury v. *Avi-Simplot, Inc.*, 93 Idaho 438, 462 P.2d 737, 741 (1969) 13, 18
Farmers Reservoir & Irrigation Co. v. *McComb*, 337 U.S. 755 (1949) 5, 14, 20
Fors Farms, Inc. v. *Washington State Employment Security Dept.*, 75 Wash. 2d 383, 450 P.2d 973 (1969) 11, 20
George I. Petit, Inc., 89 NLRB 710 (1950) 18
Hersey Estates, 112 NLRB 1300 (1955) 13
Johnston v. *Cotton Producers Association*, 244 F.2d 553 (5th Cir. 1957) 9, 18
Local Union No. 300 v. *McCulloch*, 428 F.2d 396 (5th Cir. 1970) 18
Maneja v. *Waialua*, 349 U.S. 254 (1954) 12, 18
Maplewood Poultry Company v. *Maine Employment Security Commission*, 151 Me. 467 A.2d 360 (1956) 13, 20
*McElrath Poultry Co., Inc.*v. *National Labor Relations Board*, 494 F.2d 519 (5th Cir. 1974) 13, 20
Mitchell v. *Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286 (5th Cir. 1959) 8
NLRB v. *Bayside Enterprises, Inc.*, 527 F.2d 436 (1st Cir. 1975) 15
NLRB v. *Gass*, 377 F.2d 438, 444 (1st Cir. 1967) 11, 15
NLRB v. *John W. Campbell, Inc.*, 159 F.2d 184 (5th Cir. 1947) 12
NLRB v. *Kelly Brothers Nurseries, Inc.*, 341 F.2d 433, 435 fn. 2 18
NLRB v. *Kent Bros. Transportation Co.*, 458 F.2d 480 (9th Cir. 1972) 14
NRLB v. *Olaa Sugar Company*, 242 F.2d 714 (9th Cir. 1957) 19
NLRB v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1033, 1032-35 (5th Cir. 1969) 8, 9, 18
NLRB v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972) 19

Page

North Whittier Heights Citrus Assn., 10 NLRB 1269 (1939) 16
Vives v. *Serralles*, 145 F.2d 552 (1st Cir. 1944) 14
Waldo Rohnert Co. v. *NLRB*, 322 F.2d 46 (9th Cir. 1963) 8
Wirtz v. *Jackson & Perkins Co.*, 312 F.2d 48 (2nd Cir. 1963) 8
Wirtz v. *Osceola Farms Co.*, 372 F.2d 584 (5th Cir. 1967) 20
Wirtz v. *Tyson's Poultry, Inc.*, 355 F.2d (8th Cir. 1966) 10

Statutes

Fair Labor Standards Act, as amended (52 Stat. 1060, 29 U.S.C. 201, *et seq.*) 2
Section 3(f) 3, 19
Section 13(a)(6) 18
Section 13(g) 18
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2
Section 2(3) 2, 5
60 Stat. 698 2
87 Stat. 763 2

Miscellaneous

Broiler Industry: An Economic Study of Structure, Practices and Problems, U.S. Department of Agriculture (1971) 17, 18
54 Cal. L. Rev. 1939, 1955 18
25 Labor Law Journal 241 19
Legislative History of NLRA, p. 3202 18
Vertical Coordination via Contract Farming, Economic Research Service, U.S. Department of Agriculture, Miscellaneous Publication No. 1073, p. 74, *et seq.* (1968) 10

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1267

BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY,
and POULTRY PROCESSING, INC.

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals (Pet. app. A. 1-5) is reported at 527 F.2d 436. The Board's Decision and Order (Pet. app. A. 7-22) are reported at 216 NLRB No. 91.

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1975 (Pet. app. A. 6). The Petition for a Writ of Certiorari was filed March 8, 1976 and was granted on May 19, 1976. The jurisdiction of this court rests on 28 U.S.C. 1254 (1).

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 2 * * *

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parents or spouse, or any individual having the status of independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

Since 1946, riders to the Board's appropriation acts (e.g., 60 Stat. 698; 87 Stat. 763) have regularly provided that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act (F.L.S.A.) 29 U.S.C. 203(f).

* * *

The relevant provisions of the Fair Labor Standards Act, as amended (52 Stat. 1060, 29 U.S.C. 201, *et seq.*) 29 U.S.C. 203(f):

> 3(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Question Presented

Whether the Court of Appeals correctly determined that the Board's decision that employees of a poultry organization vertically integrated from hatcheries to processing plant, who transport feed from the company's feed mill to its contract farms are covered "employees" rather than exempt "agricultural laborers" under the National Labor Relations Act as defined in the Fair Labor Standards Act.

Statement

Bayside Enterprises, Inc. and Poultry Processing, Inc. are parent and subsidiary corporations engaged in poultry hatching, breeding, raising, processing, and marketing in central coastal Maine. Like many other poultry organizations these days, the companies, which have been found to be one joint enterprise, are made up of several elements.

There is a breeder hatchery at Waldo with six primary breeder farms connected to it (A. 11), a commercial hatchery at Unity with eleven farms connected to it (A. 11), and a feed mill at Thorndike that produces 80-85 percent of the feed required by the Bayside contract farmers (A. 24-25). At the time of the hearing, one-third of the production of this mill was sold to an unconnected company[1] (A. 26). Also located at Thorndike with a separate office for its dispatcher (A. 49) is the feed move operation whose drivers are the subject of this case. They deliver all of the Bayside medicine and feed produced at the mill to the Bayside contract farmers (A. 42). The other one-third of the production of the feed mill that is sold to an unconnected company, is transported to their contract farms by an independent trucker (A. 6). There is also a processing plant at Belfast (A. 17-18) that processes all of the Bayside Poultry (A. 35), and a general business office at Belfast where the General Manager, Comptroller, Breeder Department Manager, Broiler Department Manager, and the accounting office is located (A. 8, 60). Over two-thirds of the 119 contract farms are located within a 12 to 15 mile radius of the feed mill (A. 17).

Beside the feed drivers that deliver the feed and medicines in specialized trucks, the enterprise has other truck drivers that transport eggs to breeder farms and chicks to the contract farms (A. 18). Attached to the processing

[1] The Company's feed mill now is used exclusively for its own production needs.

plant under separate supervision are truck drivers that catch, coop, and deliver the birds from the contract farms to the processing plant (A. 50-51). There are farm supervisors who check the health of the poultry on a regular basis at the farms (A. 13, 45), and there is a full time farm crew that take blood tests, debeak and vaccinate the poultry, and clean the poultry houses after each flock is taken out (A. 19). The company also employs a full time geneticist to constantly improve the strain (A. 10). The ownership of both feed and poultry is at all times in Bayside.

The enterprise has organized itself so that the 400 employees of the processing plant and the feed mill are paid by Poultry Processing, Inc. The other 80 working at and for the hatcheries, breeding and contract farm, are paid by Bayside Enterprises Inc.[2]

Argument

THE COMPANY'S SIX FEED DRIVERS ARE "AGRICULTURAL LABORERS" AND THEREFORE EXEMPT UNDER SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT.

I. INTRODUCTION AND SUMMARY

The combination of Section 2(3) of the NLRA exempting "agricultural laborers" with the annual appropriation rider for the NLRB defining those words under Section 203(f) of the Fair Labor Standards Act have produced this controversy over the eligibility of the appellants to fall within that definition.[1] *Farmers Reservoir & Irrigation*

[2] The Petitioners can accept the factual findings of the Administrative Law Judge (Pet. app. A. 9-16). In the appendix there is a more complete annotated rendition of the facts (A. 66-77).

[1] " 'Agriculture' includes farming in all its branches and . . . includes . . . the raising of . . . poultry and any practices . . . performed by a farmer or on a farm as incident to or in conjunction with such farming operations . . ."

Co. v. *McComb*, 337 U.S. 755, 762-63 (1949) has pointed out that the FLSA section has two distinct parts — (1), actual farming operations and (2), "any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations." *Id.* at 763.

Since the work of the feed drivers in loading, transporting, and delivering feed to their employer's contract farms is not actual farming, Bayside contends that their work falls within the secondary branch of farming. To so qualify, their employer must be a farmer and their own work must be incidental to such farming.

The conflict within the National Labor Relations Board and between the circuits centers upon the first of those requirements, namely, is a poultry organization such as this a "farmer." The question of the work being incidental to farming in this particular case has much less significance because if the company is a farmer it follows that the work of the drivers is incidental to that farming.

The rejection of the classification "farmer" for Bayside and companies like it by the NLRB and the First Circuit has two distinct generic roots. The first emphasizes the contract farmers, maintaining that it is they and not the company who are raising the poultry. The second argument stresses the processing plant, urging that it gives the whole company a commercial coloration that predominates over any farming aspect.

The company maintains that both the contract farmers and the processing plant are but parts of a whole, integrated operation that has as its essence the raising and marketing of its own poultry and as such it is a "farmer."

II. Bayside as a Farmer

A. *Bayside as Less Than a Farmer — The Growout Contract*

The principal argument against Bayside being a farmer centers upon the growout contract with its farmers. This is the arrangement whereby the birds from its hatcheries and breeding farms are placed upon farms belonging to others until they grow to maturity (a typical contract and a duplicate of Exhibit 1 can be found at Page A. 23 of Pet. App.)

From the contract farmer's point of view, he agrees to keep and maintain suitable facilities for the flocks, including adequate housing, water, feed, oil storage, and dead bird disposal facilities, according to Bayside's specifications. He also agrees to follow Bayside's directions in the care and management of each flock, to use only Bayside materials for feeding and maintenance, and to have no other poultry on his farm during the contract period (Pet. App. A. 26-27).

Bayside furnishes the chicks, feed, fuel, litter, medicaments, and vaccines, makes the decision when and what kind of poultry are placed on each farm, what they are fed (A. 15), what medicines, vaccines, and blood tests are administered, and when to remove each flock from the farmer's premises (A. 45). Bayside maintains a farm crew that watches over these farms and cleans out the poultry houses after each flock is removed (A. 20).

In return for his services and the use of his facilities, the farmer is guaranteed payment on the basis of the square footage in his poultry house plus a bonus based on the pounds of poultry he has produced in relationship to his production costs with the rest of the growers (A. 30). This contract arrangement between the farmer and the company is the focal point in the clash between the argu-

ments over whether the farmer is an integral part of the poultry company or whether he is an independent entrepreneur.

In the brief for the Respondent, on the petition for certiorari in this case, there are cited three cases as examples of analogous contract arrangements with the Bayside growout contract (p. 7). They are *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286 (5th Cir. 1959) rose growers; *Wirtz* v. *Jackson & Perkins Co.*, 312 F.2d 48, 51 (2nd Cir. 1963) nursery stock; and *Elm Spring Farm* v. *United States*, 127 F.2d 920 (1st Cir. 1942) milk handler. Petitioners have also found another case favorable to the Respondent, *Waldo Rohnert Co.* v. *NLRB*, 322 F.2d 46 (9th Cir. 1963) seed growers.

However, Petitioners feel that these cases not only do not support Respondent, but make clearer the distinction of a vertically integrated poultry grower.

In *Mitchell* v. *Huntsville, supra*, although Huntsville supplied the growers with the plants, it only paid them "based on an agreed amount for each *merchantable* plant produced" 267 F.2d 289 for 2.[2]

In *Jackson & Perkins, supra*, although the growers provided the land, labor and equipment, they agreed to indemnify the company for any claims arising out of the farming operations. The growers also bore any loss due to crop failures save for the cost of the original understock, and the developed stock was *sold* by them to the defendant at a price calculated per *saleable* plant. 312 F.2d 48, 51.

The *Elm Spring Farm* case, *supra*, was a promotion by a company to a group of dairy farmers to claim the milk received from the farmers was its own and thereby escape

[2] The same Fifth Circuit in *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1033 (5th Cir. 1969) distinguished *Huntsville* saying the stock was *purchased* and that the growers were not employees or agents of the company.

making payments to an equalization pool. The court properly disregarded what it called an "elaborate camouflage" since at any time the cooperative could make the farmer take back title to a cow or the farmer himself could demand a retransfer of all the cows on 90 days notice. The risk of loss in the production of milk remained upon the individual farmer. 127 F.2d 920, 926.

In the *Rohnert Co.* case, *supra*, the growers also did not receive compensation under the seed contract for any crop seed which was not as to quality and grade acceptable to Rohnert "as acceptable merchantable seed" and the grower had to pay Rohnert for any planting seed supplied by it if the planting seed failed to produce a crop or produced undergrade crop seed. 322 F.2d 46, 47.

The common thread in these cases was the fact that the farm product had to be marketable, saleable, or acceptable to the company and thus the risk of loss fell on the farmer.[3]

The First Circuit looks upon the Bayside-farmer arrangement and labels it in "support" of the raising of poultry, 527 F.2d 436, 438. It thus rejects the argument in *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969) that companies such as *Strain, Bayside*, and other vertically integrated poultry organizations are engaged in farming in its primary sense.

What *Strain* points out is that it is the poultry company that continually retains the ownership of the birds and assumes the risk of loss throughout the entire process. It also assumes the risk of market fluctuations which affect the price of the birds. This is unlike the previous contractor-

[3] Even in *Johnston* v. *Cotton Producers Association*, 244 F.2d 553, 554 (5th Cir. 1957), the case quoted in the Department of Labor interpretation 29 C.F.R. 780.126 (1972) relied upon by the First Circuit, the Exchange *sold* the baby chicks to the farmer-customer, but retained title as security for the purchase price and for advances for feed, supplies or equipment.

farmer examples in which it is the farmer that accepted this risk.

In *Wirtz* v. *Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966) the situation is very much like Bayside with a corporation and two subsidiaries that together make up a single integrated egg producer. There the court said at Page 258:

> ". . . the appellees (Tyson) are farmers and the ones who initiate the farming operations here involved. Without appellees the independent growers arguably would never have undertaken the initial and continuing cost of acquiring the birds and producing the eggs. The contract growers merely *aid* the appellees, who the District Court found to be the ones qualified to claim the agricultural exemption . . ."

The point is that it is not the poultry company that is supporting the farmers, but it is the farmers who are aiding the company in raising the poultry.

Whether you define the relationship as an agency, subcontractor, or in substance as a lease by the company of the farm, equipment, and labor (A. 12), the elements of entrepreneurship have been shifted by contractual agreement from the farmer to the contractor-company. *Vertical Coordination via Contract Farming, Economic Research Service U.S. Department of Agriculture,* Miscellaneous Publication No. 1073, p. 74 *et seq.* (1968). It is this shifting that makes the farmer an integral part of the company. The income of the farmer is not affected by the market price at the time the poultry leaves his farm and he is guaranteed at least a minimum preset price, no matter what the market.

B. *Bayside As More Than A Farmer — The Processing Plant*

The Court of Appeals decision in this case although using the independent contract farms argument also makes a

different argument grounded in the company's ownership of a processing plant for its poultry. The decision states that the Court's previous decision in *NLRB* v. *Gass,* 377 F.2d 438, 444 (1st Cir. 1967) was predicated on the fact that the truckdrivers there were employed by an integrated poultry *processing* company. The decision characterizes Bayside as a multifaceted organization whose enterprises and purposes go beyond the bounds of farming. It points to the feed mill and processing plant where it says the bulk of the capital and personnel are, and notes that these are "concededly" not farming. Finally, it denies the farm exemption distinguishing other contrary opinions because those companies were engaged in "traditional" agriculture with no processing plant. The court finishes by saying Bayside's operations are not "predominantly" agriculture.

Although there are certain elements in this commercial argument that find their root in the independent contract farmers argument (i.e. if the farmers were indeed independent then the processing plant would actually be a commercial enterprise since it was processing the products of different farms and different farmers, *Bowie* v. *Gonzalez,* 177 F.2d 11, 18 (1st Cir. 1941)) the major point is like that articulated by the Supreme Court of Washington in *Fors Farms, Inc.* v. *Washington State Employment Security Dept.,* 75 Wash 2d 383, 450 P.2d 973 (1969). There the court said that a corporation engaged in processing chickens and manufacturing chicken feed was no[4] an exempt employer because basically its operation was . mmercial processing company seeking a stable supply o. chickens, rather than a farming operation seeking a way of marketing products.[4]

---

[4] The *Fors Farms* case was a particularly difficult one as it involved processing plant employees who had previously been covered by the unemployment law and now that their plant had been merged with a farmer, he argued that they should be exempt.

This theory that in a poultry company the entire organization is incidental to the processing plant rather than the reverse is not in keeping with a view of the company as a single enterprise concerned with all aspects of growing, raising, and selling its own product.[5]

In *NLRB* v. *John W. Campbell, Inc.*, 159 F.2d 184 (5th Cir. 1947) the court said at Page 187

> "no farmer, dependent upon that which he produces to sustain his operations, could long exist if he could not market that which he produces . . . the wheat farmer must thresh his wheat; the cane grower must cut his cane and make its juice into syrup; the cotton grower must gin and bale his cotton; the citrus grower must pick and pack his oranges; and the tomato grower must do likewise. So long as these undertakings are in preparation and packing by him for market of that which he has grown on his farm, the labor necessary thereto is agricultural labor."

The court went on to say that if you bought, packed or marketed the products of another, that was commercial; while if you packed products from your own farm, that was agricultural, and that the growing, harvesting, packing, and selling of your own product was all part of a single enterprise (agriculture) 159 F.2d 184, 187.

---

[5] In *Abbott Farms, Inc.* v. *NLRB*, 487 F.2d 904, 905 (5th Cir. 1973) the court in referring to the trucking operation from the feed mill of Abbott said in referring to *Strain*, "There, as here, the question was whether the poultry raiser was conducting a trucking operation (feed mill) on the side or whether the operation (mill) was part of a poultry raising venture; — Bayside in this case would similarly contend that not only its trucking, but its processing plant was part of a whole poultry-raising enterprise. This does not necessarily mean that the work of every employee automatically is classified as "agricultural labor" only that Bayside is a "farmer" under the F.L.S.A. *Maneja* v. *Waialua*, 349 U.S. 254 (1954).

The Maine Supreme Judicial Court has spoken directly on this issue in construing its unemployment statute. In *Maplewood Poultry Company* v. *Maine Employment Security Commission*, 151 Me. 467, 472, 121 A.2d 360 (1956) the court said "we are not aware of any decision which labels the business of raising poultry as a business enterprise."

In *Etchechoury* v. *Avi-Simplot, Inc.*, 93 Idaho 438, 462 P.2d 737 (1969) the highest court of that state exempted employees of the company processing plant from the employment law as agricultural laborers where the employer owned breeder and poultry farms and processed only his own poultry.[6]

In the *McElrath Poultry Co.* case, 206 NLRB No. 94 enf. denies *McElrath Poultry Co., Inc.* v. *NLRB*, 494 F.2d 519 (5th Cir. 1974) the company was a subsidiary of a parent company with a processing plant. There the drivers in the feed move operation were ruled exempt as agricultural laborers despite the processing plant.

Petitioners question whether in a typical vertically integrated operation that produces all the poultry it processes or to put it another way, processes all it produces, it is possible to characterize the entire operation by the predominant motivation (i.e. to assure a stable market for poultry; to seek a way to market the product).[7]

If it is, it would seem the more important aspect would be to sell a saleable product; and in the absence of a live market for poultry, the birds must be processed (A. 18). See *DiGiorgio Fruit Corp.*, 80 NLRB 853, 855-857 (1948).

---

[6] The court said, "The test as to what constitutes agricultural labor turns not on the size of the farming operation involved but rather on whether the processor is in reality a farmer-producer, and whether the processing is incidental to such farming." 462 P.2d 737, 741.

[7] There are, however, obvious cases, *Hersey Estates*, 112 NLRB 1300 (1955) (a chocolate maker who provided recreational facilities)

C. *Bayside As A Poultry Raiser — The Employing Entity*

Of extreme importance in all of this discussion and of absolute necessity before the question of "raising poultry" can be resolved, is what is the employment entity we are discussing. *Farmers Reservoir,* 337 U.S. at Page 760 says that whether a particular type of activity is agricultural,

> "... is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity."

That case itself demonstrated this principle by example when the Court ruled the separately organized water company there involved to be a non-farmer.[8] In *NLRB* v. *Kent Bros. Transportation Co.*, 458 F.2d 480 (9th Cir. 1972) an independently organized trucking company that transported the produce of others was similarly held covered by the NLRA.

Thus, in each case, the answer to the question of which entity is the person employed and paid by is sometimes determinative of his status, *Vives* v. *Serralles,* 145 F.2d 552, 555 (1st Cir. 1944).

In the poultry industry, whether because of the newness of the vertically integrated form of business, the use of

[8] The court at Page 766 went on to clarify, "... it is equally clear that it does constitute a practice performed as 'an incident to or in conjunction with' farming. If the act exempted all such practices, the company would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm."

multiple corporations, or the fact that the nature of the business requires several quite different elements, there has always been some confusion about just what was the employing entity. In the *Gass* case before the NLRB, the trial examiner wrote that Gass was "either an integral part of this integrated commercial enterprise (Lipman) which has engaged in commerce or else it was an independent trucking concern hauling for a commercial enterprise which, in turn, was engaged in commerce", 154 NLRB 728, 746. The Board said the same feed drivers were employed by joint employers, 154 NLRB 728, 732-733. When the case reached the Court of Appeals, the court said, "It is significant that these drivers are not employed or paid by the farms nor are they under the control of the farmers", *NLRB* v. *Gass,* 377 F.2d 438, 444 (1st Cir. 1967).

When the First Circuit decided this case it found Bayside "a multi-faceted organization" and agreed with the administrative law judge "that Bayside and its component parts constitute a single employer with common ownership management and control of labor relations." Further it stated that Gass was part of an integrated poultry processing company, *NLRB* v. *Bayside Enterprises, Inc.,* 527 F.2d 436 (1st Cir. 1975).

The court went on to say, however, that although Bayside could not be classified as a farmer for that portion of its business which supports raising of poultry on contract farms, it was a farmer in relationship to its chick hatcheries and breeder farms. 527 F.2d 438-439.

The court has, therefore, formulated a rule whereby the vertically integrated company as a whole would not be regarded as engaged in primary agriculture, but parts of it would, i.e., the hatcheries and breeder farms.[9] In support

[9] From the company's point of view the employing entity has also not been free from doubt. The case was tried before the Administrative Law Judge on the theory that only the feed drivers' employer, Bayside Enterprises, Inc., was the farmer and that the subsidiary Poultry Processing, Inc. was not.

of the denial of the whole company's status as a farmer, the court cited the Department of Labor interpretation 29 C.F.R. 780.126 (1972) that begins "Feed dealers and processors sometimes enter into contractual arrangements with farmers . . .".

Although Bayside – Poultry Processing as a single enterprise owns a feed mill and a processing plant, it, as an organization, cannot be classified as either, nor does the statutory exemption depend on the concept of ownership. The FLSA makes specific reference to the *raising* of poultry. It is by this standard Bayside seeks to be judged. *North Whittier Heights Citrus Assn.*, 10 NLRB 1269 (1939). Is it raising poultry?

Bayside begins its poultry program with the hiring of a full-time geneticist (A. 10) who selects the basic breeders and the traits desired in the birds to be grown. There is a breeding hatchery with four or five breeding farms which breed and select strains or lines of birds (A. 10) and there is a commercial hatchery with eleven breeding farms attached to it whose function is to take in eggs and hatch chicks (A. 11). When the chicks are one day old, they are placed on the contract farms (A. 23) and stay there for about nine weeks. Whether on one farm or the other, Bayside's farm crew debeak, vaccinate, and blood test the flocks (A. 19, 20). The company decides which farmers raise which birds (A. 43) and initiates a feed program. This requires designing the composition of the feed and seeing that it is changed at least four times during the growing cycle (A. 13-14). In addition, the company has four field supervisors to check each farm on a routine basis (A. 13). A preventive program is maintained for poultry disease, but should it break out, the company treats the poultry using both feed and water (A. 64). It delivers the feed to the farms and picks it up when no longer needed (A. 22). It delivers the chicks to the farms and catches, coops and delivers the

fully grown birds to the processing plant (A. 51). The size of the operation is substantial as at any one time there are 3½ million birds (A. 20), all of which are subsequently processed by the processing plant (A. 35).

It is important to understand that there is a central management of this whole operation from egg to processing that is coordinating and making the strategic economic decisions. This emanates from a separate main office in Belfast with a general manager (A. 77) and a common controller (A. 76). Also located there is the broiler department manager, who coordinates the scheduling of both feed and chicks to the farms. In addition he is in charge of the continued health of the flocks (A. 68). This puts him in contact on a daily basis with farm managers, farm servicemen, the dispatcher at the feed mill, the pick up crews, and the farmers themselves (A. 62, 64).

Besides the pick up crew that comes from the processing plant to the farms, there is a driver who delivers animal by-products from the processing plant to the feed mill for inclusion in the feed (A. 74). The feed formula is watched very carefully, not just because of the type and age of the poultry, but because of the weather and because of price changes and availability of ingredients (A. 14).

The advantage of owning all elements of a poultry organization, besides the coordination advantage, is the opportunity to control as many variables as possible. Bayside does not grow its own grains nor does it retail its chickens, but in all other respects, its ownership or control allows it more flexibility than otherwise. It is no longer necessary to make a profit on the passing from one stage to another. This has allowed greater cost efficiency with a consequent price decline and a consumption increase. *The Broiler Industry: An Economic Study of Structure, Practices and Problems,* U.S. Department of Agriculture (1971).

There is no doubt that in the past there have been different forms used in the poultry industry that arguably were not agriculture. Certainly an independent feed dealer[10] or an independent food processor[11] were not in agriculture. However, where the company is hatching, breeding, participating actively in the growing and then processing its own product, it should be considered a farmer, *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1032-35 (5th Cir. 1969); *Etchechoury* v. *Avi-Simplot, Inc.*, 43 Idaho 438, 462 P.2d 737, 741.

There is nothing in the history of the NLRA,[12] nor the history of the passage of the 1946 rider[13] that would deny this exemption. When this Court regarded the fact that Waialua was using a railroad to transport its sugar cane from the field to the mill, it said, "There is no reason to construe the FLSA so as to discourage modernization . . ."[14]

The poultry industry has merely borrowed the vertically integrated structure from industry, or to put it another way, has reverted back to the small, self-contained family farm it was in the 1920's on a much larger scale. *The Broiler Industry, supra.*[15]

Nor is there any compelling social reason for placing the vertically integrated poultry company in the commerce column. Through Section 13(a)(6), the agricultural exemption has been narrowed and most recently in 13(g) the

---

[10] *Johnston* v. *Cotton Producers Association*, 244 F.2d 553 (5th Cir. 1957).

[11] *George I. Petit, Inc.*, 89 NLRB 710 (1950).

[12] *Legislative History of NLRA*, p. 3202 and 54 Cal. L. Rev. 1939, 1955, fn. 72.

[13] *NLRB* v. *Kelly Brothers Nurseries, Inc.*, 341 F.2d 433, 435, fn. 2.

[14] *Maneja* v. *Waialua*, 349 U.S. 254, 261.

[15] The agricultural exemption of the N.L.R.A. is not measured by the magnitude of the farmer's planting nor the prolifigacy of his harvest. *Local Union No. 300* v. *McCulloch*, 428 F.2d 396, 399 (5th Cir. 1970).

exemptions have been restricted even more, excluding any employee who works for a controlled establishment with a gross volume of sales exceeding $10,000,000. Congress, by modifying 3(f) in the same manner, could include most vertical integrators in the NLRA. It, however, has not shown the inclination to do so. *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20, 21 (9th Cir. 1972). Indeed there is a good argument that like the construction industry, because of the complex character of the problem, special treatment is indicated. 25 *Labor Law Journal* 241.

To hold this company nonagricultural, is not merely what the minority in *Colchester Egg Farms, Inc.*, 214 NLRB No. 64 (1974) says is to compartmentalize what is essentially a total farming activity, but is, in effect, to "process" Bayside as Bayside processes its broilers — chopping off its head by disregarding the importance of its management to the whole organization and then dismembering it into parts.

What is needed is an approach viewing the vertical integrator as engaged in primary agriculture and then an inquiry as to whether a specific employee's work is "incidental to or in conjunction with" that agriculture.

III. The Feed Drivers as Being Incidental to and in Conjunction With Farming.

The employer has centered its feed move operation in the middle of its contract farms. With four trucks and six drivers. Bayside delivered feed to the farms itself even when it did not have a feed mill (R. 89, 222). The drivers only deliver Bayside feed. There is a separate office at the mill for the dispatcher where the drivers report because it is the most central point (A. 17). *NLRB* v. *Olaa Sugar Company*, 242 F.2d 714, 718 (9th Cir. 1957). The testimony is that the purpose in having your own feed move operation rather

than subcontracting is to maintain control over contamination (A. 42). This is so because the duties of the drivers are not just positive ones such as loading, transporting, and unloading, but are also negative ones, such as preventing the transmission of disease, the contamination of the feed, and scaring of the flocks (A. 42).

In *Farmers Reservoir,* this court said that the delivery of water was a practice performed as an incident to or in conjunction with farming, 337 U.S. 755, 766. So, too, is the delivery of feed to poultry.[16] The evidence is that each farm must receive a delivery at least once a week (A. 20). See *Wirtz* v. *Oscealo Farms Co.,* 372 F.2d 584 (5th Cir. 1967).

Other courts have held that the feed drivers as well as even the feed mill employees themselves are engaged in raising poultry, *Abbott Farms, Inc.* v. *NLRB,* 487 F.2d 904 (5th Cir. 1973), *McElrath Poultry Co., Inc.* v. *NLRB,* 494 F.2d 518 (5th Cir. 1974). They are like the field men in *Fors Farms, Inc.* v. *Washington State Employment Security Dept.,* 450 P.2d 973, 976 and the servicemen, pick up crews, and grain crews (feed truck drivers) in *Maplewood Poultry Co.* v. *Maine Employment Security Commission,* 151 Me. 467, 121 A.2d 360 (1956). Basically, each class of employee is offering a service to the grower concerned with the raising of poultry. See also *Birmingham* v. *Rucker's Breeding Farm,* 152 F.2d 837, 840 (8th Cir. 1945). The feed driver is intimately involved in the growth and protection of the birds whose feed and medicine he delivers.

---

[16] The Court of Appeals adheres to its disjunctive approach to Bayside, "... the Bayside feed delivery system is part of a separate organization, supportive of agricultural activity, but not directly engaged in farming." 527 F.2d 436, 438. This ignores the testimony of the dispatcher concerning the integration of the feed delivery with the hatchery, the broiler department manager, and the farmers (A. 45, 46). Even the birds themselves have more control over feed delivery than the dispatcher (A. 14, 21).

Conclusion

The judgment of the Court of Appeals should be reversed and the case remanded with instructions to enter a decree denying enforcement of the Board's order and dismissing the case for want of jurisdiction.

Respectfully submitted,

ALAN J. LEVENSON, Esq.
Attorney for Petitioners
Bayside Enterprises, Inc.,
Penobscot Poultry Company, and
Poultry Processing, Inc.

July 15, 1976